

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of the Commission's)	MB Docket No. 10-71
Rules		
Related to Retransmission Consent)	

COMMENTS OF PUBLIC KNOWLEDGE AND NEW AMERICA FOUNDATION

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I. INTRODUCTION.

Congress instituted the retransmission consent regime to preserve the public interest benefits associated with over-the-air broadcasting at a time when cable providers were monopolies. The regime provides powerful rights to broadcasters thereby giving them great leverage in retransmission consent negotiations. This regime no longer serves the public interest. Public Knowledge (PK) and New America Foundation (NAF) commend the Commission for proposing to reform it. Our comments are in addition to arguments we put forth in our Petition for Rulemaking¹ and other communications with the Commission.

II. THE COMMISSION HAS AUTHORITY TO IMPOSE INTERIM CARRIAGE AND MANDATORY ARBITRATION REQUIREMENTS.

The Notice of Proposed Rulemaking (NPRM)² concludes that the Commission does not have the authority to require mandatory interim carriage of broadcast signals while good faith negotiations are ongoing or dispute resolution proceedings are pending. Similarly, the NPRM concludes that section 325 of the Communications Act³ and the Administrative Dispute Resolution Act (ADRA) prohibit the Commission from imposing mandatory arbitration.⁴ PK and NAF respectfully disagree with the Commission's analysis of its authority and reiterate that the Commission has ample authority under the Communications Act and the ADRA to impose interim carriage requirements as well as mandatory arbitration.

¹ Public Knowledge et al. *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, (March 9, 2010).

² Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, MB Docket No. 10-71, (March 3, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0303/FCC-11-31A1.pdf. (hereinafter "NPRM").

³ 47 U.S.C. §325.

⁴ NPRM, *supra* note 2, at ¶18.

In concluding that the Commission lacks authority to require interim carriage, the NPRM asserts that section 325(b) of the Communications Act “expressly prohibits retransmission of a broadcast signal without the broadcaster’s consent.”⁵ However, the plain language of the section only prohibits retransmission *by MVPDs* “without the express authority of the originating station.”⁶ As PK and NAF have explained before, it does not impose any prohibition on Commission action⁷.

Furthermore, contrary to the Commission’s interpretation, legislative history of section 325 does not prohibit mandatory interim carriage. As the NPRM rightly notes, legislative history states that retransmission consent provisions are not intended to “dictate the outcome of the ensuing marketplace negotiations.”⁸ However, reading that statement in context shows that its purpose was to clarify that Congress did not have an opinion on the method of compensation sought by broadcasters for retransmission consent. Thus, Congress did not opine as to whether cash compensation or in kind considerations, such as “joint marketing efforts, opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system” was better. However, Congress certainly did not indicate that it meant to foreclose any Commission regulation to govern the conduct of parties to a retransmission consent negotiation. On the contrary, by indicating that the purpose of the Cable Television Consumer Protection and Competition Act of 1992 was “to promote competition in the multichannel video marketplace and to *provide protection for consumers against monopoly rates and poor service*,” Congress has

⁵ *Id.*

⁶ 47 U.S.C. §325(b)(1)(A).

⁷ Letter from Public Knowledge, Open Technology Initiative, and Benton Foundation to Julius Genachowski, Chairman, Federal Communications Commission, January 4, 2011.

⁸ NPRM, *supra*, note 2, at ¶7.

indicated that the Commission should act to preserve these values. To the extent that the Commission finds that the retransmission consent negotiations adversely affect consumers, nothing in the legislative history of the Cable Television Consumer Protection Act prevents the Commission from acting to preserve public interest including by requiring mandatory interim carriage and arbitration.

Rather, the Communications Act confers upon the Commission ample authority to regulate the conduct of broadcasters and MVPDs, including by requiring mandatory interim carriage and mandatory arbitration. First, section 303(r) of the Communications Act provides the Commission with general authority to make rules and regulations that are necessary to carry out the provisions of the Communications Act.⁹ As the NPRM notes, impasses or near impasses in retransmission consent negotiations affect consumers' ability to continue to receive certain broadcasts.¹⁰ Because the statutory scheme of the Communications Act requires the Commission to secure "the public convenience, interest, or necessity,"¹¹ the Commission has power to require interim carriage and mandatory arbitration.

Second, the Commission has long had broad authority to ensure that broadcasters, in exchange for access to the airwaves, live up to their obligations as public trustees.¹² By means of its exclusive control over broadcast licenses, and its requirement to consider the public interest, convenience, or necessity in taking action, the Commission is invested with "enormous

⁹ 47 U.S.C. §303(r).

¹⁰ NPRM, *supra* note 2, at ¶¶15, 16.

¹¹ See e.g. 47 U.S.C. §307(c)(1) (empowering the Commission to renew broadcast licenses if it finds that "public interest, necessity, and convenience" would be served); §309(a)(empowering the Commission to grant licenses for broadcast stations if "public interest, necessity, and convenience" would be served).

¹² See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116-19 (1973), *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969), *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 227 (1943).

discretion” to regulate broadcasters according to its conception of the public interest.¹³ The 1992 Act, which established the must-carry and broadcast-consent provisions, also underscored the public interest in cable carriage of broadcast signals. The Act emphasized the government’s “substantial interest in having cable systems carry the signals of local commercial television stations,”¹⁴ and announced a Congressional policy to “promote the availability to the public of a diversity of views and information through cable television.”¹⁵ The Commission would be well-justified to rely on these provisions to conclude that broadcast signals should be carried on an interim basis while retransmission consent is being negotiated.

Third, the Commission’s obligation to protect consumers against high cable rates that might arise as a result of retransmission consent negotiations, buttresses this general authority. Section 325(b)(3)(A) requires the Commission to “govern the exercise by television broadcast stations of the right to grant retransmission consent . . . and of the right to signal carriage,”¹⁶ and also requires the Commission to “consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and . . . ensure that . . . the rates for the basic service tier are reasonable.”¹⁷

Similarly, the Administrative Dispute Resolution Act (ADRA) does not prevent the Commission from imposing mandatory arbitration. While the ADRA does require that all parties consent to an arbitration, the Commission’s own interpretation of the ADRA has held that the

¹³ *Schurz Commc’ns, Inc. v. FCC*, 982 F.2d 1043, 1048-49 (7th Cir. 1992).

¹⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-356 at § 2(a)(9).

¹⁵ *Id.* at § 2(b)(1).

¹⁶ 47 U.S.C. §325(b)(3)(A).

¹⁷ 47 U.S.C. §325(b)(3)(A), 543(b)(1).

language, structure, and legislative history of the Act confirm that administrative agencies may impose mandatory arbitration so long as that arbitration is subject to *de novo* review.¹⁸ PK and NAF submit that the proposed mandatory arbitration requirement could be subject to *de novo* review.

As PK and NAF have noted in their Petition for Rulemaking, the Commission had required that retransmission consent disputes involving Fox stations be submitted to binding arbitration.¹⁹ In that order the Commission was addressing concerns about potential abuse of market power by News Corp. following its acquisition of DIRECTV. As the NPRM notes, similar concerns about abuse of market power animate many retransmission consent negotiations today. To address these concerns, the Commission should require all retransmission consent negotiations to be subjected to mandatory arbitration or other similar mechanisms.

II. THE FCC'S PROPOSALS TO AUGMENT ITS GOOD FAITH REGULATIONS WOULD REMOVE UNFAIR BROADCASTER LEVERAGE IN RETRANSMISSION CONSENT NEGOTIATIONS AND INTRODUCE NEW RULES THAT ARE FAIR TO ALL PARTIES.

The NPRM proposes to augment existing good faith negotiation requirements with new *per se* violations. The proposals outlined in the NPRM would remove the enormous leverage broadcasters have in retransmission consent negotiations and induce basic principles of fairness into these negotiations.

¹⁸ *TCR Sports Broad. Holding, LLP v. Time Warner Cable, Inc.*, Order on Review, DA Docket No. 08-24441, ¶ 52 (October 30, 2008) (dismissing party's assertion that Commission's imposition of mandatory arbitration violated the ADRA.).

¹⁹ *See General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 222 ("News Corp. Order").

The NRPM proposes to treat the practice of network approval of its affiliates' retransmission consent agreement with an MVPD as a *per se* violation. As PK and NAF have noted in their petition for rulemaking, the networks' participation in retransmission consent negotiations worsens the competitive imbalance between broadcasters and MVPDs.²⁰ Because networks attempt to siphon off portions of retransmission consent revenue away from local affiliates, it harms local broadcasting. By ultimately raising the price of MVPD services, it harms consumers. Therefore, the PK and NAF agree that network approval of affiliates' retransmission consent agreements should amount to a *per se* violation of the good faith requirement.

The NPRM asks for data on how often a network's practice of reviewing its affiliate's retransmission consent agreement affects retransmission consent negotiations.²¹ Gathering such data in a comprehensive form in order to inform the Commission's decision is extremely difficult because of the secrecy surrounding retransmission consent negotiations.²² Therefore, while reviewing data is important and the Commission's data request is a step in that direction, to be useful, the Commission should require broadcasters and cable operators to submit such data. The Commission must make submission mandatory to prevent parties from citing contract provisions to frustrate these efforts.

The Commission has adequate power to compel such disclosure.²³ Current retransmission consent agreements are shrouded in secrecy. This shortcoming should be

²⁰ Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, *Petition for Rulemaking*, MB Docket No. 10-71, 18-19, (filed March 9, 2010).

²¹ NPRM, *supra* note 2, at ¶22.

²² See Reply Comments of Public Knowledge, *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MD Docket No. 10-71, 7-8, June 3, 2010.

²³ See 47 U.S.C. §§4(i), 303(i), and 303(r).

addressed by requiring that retransmission consent agreements be made publicly available, as suggested by Cablevision.²⁴

The NPRM also proposes to establish as a *per se* violation the practice of a station granting another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.²⁵ Like the previous proposal, this proposal would also serve to reduce the competitive disadvantage that an MVPD faces in retransmission consent negotiations and should be adopted.

The NPRM's proposal to establish as a *per se* violation a negotiating entity's refusal to put forth *bona fide* proposals on important issues would introduce an important element of fairness into the negotiations. In addition, it would also discourage proposals meant to stall negotiations until the last minute and avoid brinkmanship.

The NPRM solicits comments on certain additional actions that would qualify as *per se* violations of the good faith requirement. It asks whether repeatedly insisting on month-to-month retransmission consent agreements should be one of these actions.²⁶ It also asks whether the purchase of other programming services should be considered in determining whether a broadcast station has violated its good faith obligation. PK and NAF submit that both practices should be considered *per se* violations. With respect to tying purchase of other programming services to retransmission consent, such practices should not only be considered in determining

²⁴ Reply Comments of Cablevision Systems Corporation, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent Negotiations*, MB Docket No. 10-71, (June 3, 2010).

²⁵ NPRM, *supra*, note 2, at ¶23.

²⁶ NPRM, *supra*, note 2, at ¶28.

whether a broadcast station has violated good faith. Rather such actions should be considered *per se* violations of good faith.²⁷

III. PROPOSED CHANGES TO THE RETRANSMISSION CONSENT REGULATIONS WOULD BE INEFFECTIVE IN THE ABSENCE OF DILIGENT ENFORCEMENT.

The new *per se* violations proposed in the NPRM as well as existing *per se* violations could ensure that retransmission consent negotiations are fair to all negotiating parties. However, for these rules to be effective, the Commission has to enforce them. If the Commission does not amend its rules to provide for mandatory interim carriage and mandatory arbitration, the only enforcement tool available to it would be imposition of forfeiture penalties. In its 2000 Order Implementing the Satellite Home Viewer Improvement Act of 1999, the Commission reserved authority under section 503 to impose forfeiture penalties on parties that willfully and repeatedly fail to comply with its good faith regulations.²⁸ Pursuant to this authority, the Commission can impose a penalty of up to \$25,000 for each violation or each continuing day of violation, capped at a maximum amount of \$250,000.²⁹ PK and NAF submit that the Commission must exercise this power in order to protect consumers from being casualties of broadcaster or MVPD misconduct.

However, the Commission has thus far shirked away from any meaningful enforcement. Even in the one instance the Commission found a violation,³⁰ it did not enforce forfeiture

²⁷ See Public Knowledge et. Al., *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, 35, (March 9, 2010).

²⁸ Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report & Order*, 15 FCC Rcd. 5445, (2000).

²⁹ 47 U.S.C. §503(b)(2)(A).

³⁰ See Letter to Jorge L. Bauermeister, 22 FCC Rcd 4933 (2007)(finding that the MVPD Choice Cable T.V. had violated its duty to negotiate a retransmission consent agreement in good faith.).

penalties. Instead, the Commission merely required the parties to resume negotiations within 10 days and report on the status of the negotiation every 30 days. Such timid enforcement sends a message to powerful parties to these negotiations that they can ignore the good faith requirements with impunity. Without proper enforcement, the current state of affairs will continue unabated. Broadcasters will continue to use their considerable leverage to extract unfair terms from MVPDs in a manner that violates good faith requirements. They will continue to engage in brinksmanship exposing consumers to the uncertainty about whether they will continue to have access to content they paid for.

IV. THE PROPOSAL TO ELIMINATE THE NETWORK NON-DUPPLICATION AND SYNDICATED EXCLUSIVITY REQUIREMENTS WOULD REMOVE SOME OF THE UNFAIR LEVERAGE THAT BROADCASTERS HAVE, BUT THIS SHOULD BE DONE IN A MANNER THAT PRESERVES LOCALISM.

The NPRM asks whether the Commission should eliminate the rules relating to network non-duplication and syndicated exclusivity.³¹ As PK and NAF have explained before, the network non-duplication and syndicated exclusivity rules, in combination with other requirements, such as must carry, give broadcast networks an unfair advantage in retransmission consent negotiations. They work to ensure that retransmission consent negotiations are not truly market place negotiations and their elimination is likely to address some of the imbalance in the retransmission consent negotiations.

However, the network non-duplication and syndicated exclusivity rules have historically acted to preserve localism.³² As the Commission considers eliminating these rules, it should also consider whether and what effects their elimination will have on the viability of local broadcast

³¹ NPRM, *supra* note 2, at ¶42.

³² See *United Video, Inc. v. Federal Communications Commission*, 890 F. 2d 173 (D.C. Cir. 1989) (upholding the Commission's determination that program duplication lessens the value of syndicated programming purchased by local stations).

stations. One way to study these effects would be to institute periodic reviews of the state of local broadcasting. Furthermore, to prevent adverse impacts on these stations, the Commission should regulate the conduct of broadcast networks. For instance, the Commission must prohibit broadcast networks from imposing contract terms on local stations preventing them from electing must carry instead of retransmission consent. This would protect the viewership of the local station even if elimination of network non-duplication and syndicated exclusivity rules render that station less attractive to MVPDs.

Respectfully submitted,

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